Dato' Seri Hj Mustafar bin Hj Ali (Chairman of the Disciplinary Board for the Support Group (No 1), Immigration Department of Malaysia, Putrajaya) & Ors v Yuganthiran a/l Guinda Rajoo

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01(A)-624–10 OF 2021
HANIPAH FARIKULLAH, SUPANG LIAN AND NORDIN HASSAN JJCA
31 JANUARY 2023

Public Servants — Dismissal — Dismissal of Immigration officer — Whether rules of natural justice were not breached in dismissal of officer for being absent from work without leave — Whether in reply to show-cause letter officer had admitted to the misconduct and apologised for the same — Whether it was wholly within power and jurisdiction of Disciplinary Authority ('DA') to decide that officer's representation had failed to exculpate him of the charge and to find him guilty and to dismiss him from service — Whether both the DA and the Disciplinary Appeals Board, which affirmed the DA's decision, had acted within their legal powers in the dismissal of the officer

The respondent, an Immigration officer, was dismissed from service for absenting himself from work without leave ('AWOL') for 17 days in December 2015. The misconduct breached the Public Officers (Conduct and Discipline) Regulations 1993 ('the Regulations'). In reply to the show-cause notice issued to him in disciplinary proceedings, the respondent admitted the misconduct, apologised for the same, promised that it would not happen again and asked to be given a chance because he wished to continue serving in the Immigration Department. The respondent, who was stationed in the Department's Johor Bahru branch at the time, said the reason for his going AWOL was because he had to take care of his ailing father who was then in Klang. He gave a detailed account of his father's illness together with a medical report and photographs. After considering the respondent's representation, the first and second appellants (which together comprised the Disciplinary Board or 'DB') decided that it was insufficient to exculpate him of the charge and found him guilty and dismissed him from service. The fourth appellant (the Disciplinary Appeals Board or 'DAB') dismissed the respondent's appeal and affirmed the DB's decision. The respondent successfully applied to the High Court via a judicial review application to quash the decisions of the DB and DAB. The High Court judge found that: (a) the DB had committed a fatal flaw in taking into account the respondent's past record of being AWOL or of coming late to work without giving him an opportunity to rebut or explain that past conduct in accordance

with the rules of natural justice; (b) the DB had not given due consideration to the respondent's reasons for going AWOL and had failed to appoint an Investigation Committee to investigate the matter further; and (c) the failure of the show-cause letter to the respondent to state that the chairman of the DB had found the existence of a 'prima facie case' against him, as required by reg 37(2) of the Public Officers (Conduct and Discipline)(Amendment) Regulations 2002, was fatal to the disciplinary proceedings.

Held, unanimously allowing the appeal, setting aside the High Court's decision and restoring the decisions of the DB and DAB:

(1) The law was trite that the decision to decide whether a public officer has exculpated himself or otherwise on a charge of misconduct was on the Disciplinary Authority ('DA') and not the Court. The phrase 'to the satisfaction of the appropriate Disciplinary Authority' in General Order 37(4) unambiguously conferred the said power to the DA. Based on the facts and the law, the DA had not breached any procedural or substantive laws governing the disciplinary proceedings against the respondent in deciding that he had failed to exculpate himself of the charge proffered against him (see paras 30 & 32).

(2) There was no breach of the rules of natural justice in the present case as the respondent was given the right to be heard when he was asked to present his written representation to the DB to state his case. The right to be heard did not necessarily mean the right to be heard orally. The right to hear oral evidence would only arise if the DB exercised its discretionary power to appoint an Investigation Committee ('IC') under General Order 37(5), General Orders (Chapter D) to obtain further clarification. The DB did not find it necessary to appoint an IC in the present case because the respondent had admitted to the charge that was preferred against him (see paras 35 & 38–39).

(3) The respondent's misconduct was a serious one that was punishable by dismissal regardless of his past service record. In any case, there was no cogent evidence to show that the DB had in fact considered the respondent's past service record in deciding to dismiss him (see paras 40 & 43).

(4) The Disciplinary Authority was the best judge to decide whether a public officer in disciplinary proceedings should be dismissed or be punished with a lesser sentence. This discretionary exercise should not be interfered with by the court. In the present case, there was nothing to show that the DA had acted arbitrarily or with mala fide against the respondent and, therefore, there was no reason for the court to interfere with the exercise of the DA's administrative function of dismissing the respondent from service (see paras 44–45).

(5) Regulation 37(2) of the 2002 Regulations was complied with because the chairman of the DB did find that there was a prima facie case against the respondent. Nevertheless, the fact that the show-cause letter to the respondent did not expressly state that the chairman of the DB had found a prima facie case against the respondent was not fatal to the disciplinary proceedings as there was no such requirement under the law (see paras 50–52 & 55).

(6) The DB had considered the reasons given by the respondent in his representation as to why he went AWOL before deciding that the representation did not exculpate him of the charge (see para 57).

(7) The DB and the DAB had acted within their legal powers and all the relevant procedures under the regulations were strictly adhered to by them. There was no illegality, irrationality or procedural impropriety in the disciplinary proceedings against the respondent and the sentence of dismissal was within their power to make under reg 38(g) of the 1993 Regulations. The sentence was also proportionate to the respondent's serious misconduct (see para 66).

[Bahasa Malaysia summary

Responden yang merupakan seorang pegawai Imigresen telah diberhentikan daripada perkhidmatan kerana tidak hadir bekerja tanpa cuti ('AWOL') selama 17 hari pada Disember 2015. Perbuatan tersebut melanggar Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 ('Peraturan-Peraturan'). Responden menjawab notis tunjuk sebab yang di dalam prosiding tatatertib dengan mengakui perbuatan tersebut, memohon maaf dan berjanji perkara tersebut tidak akan berlaku lagi dan diminta diberi peluang kerana mahu terus berkhidmat di Jabatan Imigresen. Responden, yang ditempatkan di cawangan Johor Bahru pada masa itu, berkata alasan AWOL tersebut adalah kerana beliau perlu menjaga bapanya yang sakit ketika itu di Klang. Dia memberikan maklumat terperinci tentang penyakit bapanya bersama-sama dengan laporan perubatan dan gambar. Selepas mempertimbangkan representasi responden, perayu pertama dan kedua (yang terdiri daripada Lembaga Tatatertib atau 'LT') memutuskan bahawa alasan tersebut adalah mencukupi untuk mengenepikan pertuduhan itu dan mendapati beliau bersalah dan memberhentikannya perkhidmatan. Perayu keempat (Lembaga Rayuan Tatatertib atau 'LRT') menolak rayuan responden dan mengesahkan keputusan LT. Responden berjaya memohon kepada Mahkamah Tinggi untuk permohonan semakan kehakiman untuk membatalkan keputusan LT dan LRT. Hakim Mahkamah Tinggi mendapati bahawa: (a) LT telah secara defektif mengambil kira rekod masa lalu AWOL responden atau terlambat bekerja tanpa memberinya peluang untuk mempertikaikan dan menjelaskannya bahawa sejajar dengan keadilan semula jadi; (b) LT tidak memberi pertimbangan sewajarnya kepada alasan responden untuk AWOL dan telah gagal melantik Jawatankuasa Siasatan untuk

menyiasat perkara itu dengan lebih lanjut; and (c) kegagalan di dalam surat tunjuk sebab kepada responden untuk menyatakan bahawa pengerusi LT telah mendapati wujudnya 'kes prima facie' terhadapnya, seperti yang dikehendaki oleh perkara 37(2) Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib)(Pindaan) 2002, dan merupakan kesilapan besar di dalam prosiding tatatertib tersebut.

Diputuskan, sebulat suara membenarkan rayuan, mengenepikan keputusan Mahkamah Tinggi dan mengekalkan keputusan LT dan LRT:

(1) Telah menjadi undang-undang mantap bahawa keputusan untuk memutuskan sama ada seorang pegawai awam telah dilepaskan atau sebaliknya untuk pertuduhan salah laku adalah pada Pihak Berkuasa Tatatertib ('PBT') dan bukannya Mahkamah. Frasa 'sekiranya Pihak Berkuasa Tatatertib yang berkenaan berpuas hati' di dalam Perintah Am 37(4) dengan jelas memberikan kuasa tersebut kepada PBT. Berdasarkan fakta dan undang-undang, PBT tidak melanggar mana-mana undang-undang prosedur atau substantif yang menyelia prosiding tatatertib terhadap responden ketika memutuskan bahawa beliau telah gagal untuk membebaskan dirinya daripada pertuduhan tersebut (lihat perenggan 30 & 32).

(2) Tiada pelanggaran peraturan keadilan semula jadi di dalam kes ini kerana responden diberi hak untuk didengar apabila dia diminta mengemukakan representasi bertulisnya kepada LT untuk menyatakan pembelaannya. Hak untuk didengar tidak semestinya bermaksud hak untuk didengar secara lisan. Hak untuk mendengar keterangan lisan hanya akan timbul sekiranya LT menjalankan kuasa budi bicaranya untuk melantik Jawatankuasa Siasatan ('JS') di bawah Perintah Am 37(5), Perintah Am (Bab D) untuk mendapatkan keterangan lanjut. LT tersebut mendapati tiada keperluan untuk melantik JS di dalam kes ini kerana responden telah mengakui pertuduhan yang yang dikenakan terhadapnya (lihat perenggan 35 & 38–39).

(3) Perbuatan responden adalah serius yang boleh dihukum dengan pemecatan tanpa mengira rekod perkhidmatannya yang lalu. Walau apa pun keadaan, tiada bukti kukuh yang menunjukkan bahawa LT telah mempertimbangkan rekod perkhidmatan responden yang lalu dalam membuat keputusan untuk memberhentikannya (lihat perenggan 40 & 43).

(4) Pihak Berkuasa Tatatertib adalah penilai terbaik untuk memutuskan sama ada pegawai awam di dalam prosiding tatatertib harus dipecat atau dihukum dengan hukuman yang lebih rendah. Pelaksanaan budi bicara ini tidak boleh diganggu oleh Mahkamah. Dalam kes ini, tiada sebarang keterangan yang menunjukkan bahawa LT telah bertindak sewenang-wenangnya atau secara mala fide terhadap responden dan, oleh

itu, tiada sebab bagi Mahkamah untuk mengganggu pelaksanaan fungsi pentadbiran DA untuk memberhentikan responden daripada perkhidmatan (lihat perenggan 44–45).

(5) Peraturan 37(2) Peraturan-Peraturan 2002 telah dipatuhi kerana pengerusi LT mendapati bahawa terdapat kes prima facie terhadap responden. Walau bagaimanapun, fakta bahawa surat tunjuk sebab kepada responden tidak menyatakan dengan jelas bahawa pengerusi LT telah memutuskan terdapat kes prima facie terhadap responden bukanlah satu kecacatan kepada prosiding tatatertib tersebut kerana tiada keperluan untuk berbuat sedemikian di bawah undang-undang (lihat perenggan 50–52 & 55).

(6) LT telah mempertimbangkan alasan-alasan yang diberikan oleh responden di dalam representasinya tentang alasan AWOL tersebut sebelum memutuskan bahawa representasi itu tidak dapat membebaskannya daripada pertuduhan tersebut (lihat perenggan 57).

(7) LT dan LRT telah bertindak menurut kuasa undang-undang mereka dan semua prosedur yang berkaitan di bawah peraturan telah dipatuhi dengan ketat oleh mereka. Tiada sebarang kesalahan undang-undang, ketidakrasional atau ketidakpatuhan prosedur di dalam prosiding tatatertib terhadap responden dan hukuman pemberhentian tersebut adalah di dalam kuasa mereka di bawah perkara 38(g) Peraturan-Peraturan 1993. Hukuman itu juga sesuai dengan perbuatan serius yang dilakukan oleh responden (lihat perenggan 66).]

Cases referred to

Council of Civil Service Unions and others v Minister for the Civil Service [1984] 3 All ER 935, HL (refd)

Kerajaan Malaysia & Ors v Tay Chai Huat [2012] 3 MLJ 149; [2012] 3 CLJ 577, FC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1, FC (refd)

Mohammad Zulkhairi bin Zolkifli v Dato' Alias bin Hj Ahmad & 4 Others (Judicial Review No 25–91–08 of 2018) (unreported) (refd)

PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)

Public Services Commission Malaysia & Anor v Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1; [2008] 6 CLJ 573, FC (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia &

Anor [1990] 3 MLJ 364, SC (distd)
Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)

Legislation referred to

Public Officers (Conduct and Discipline) Regulations 1993 regs 3A, 23, 24, 37, 37(1), (2), (4), (5), 38(g)

Appeal from: *Yuganthiran a/l Guinda Rajoo v Dato' Seri Hj Mustafar bin Hj Ali Pengerusi Lembaga Tatertib Kumpulan Sokongan (No 1) Jabatan Imigresen Malaysia, Putrajaya & Ors* [2021] MLJU 2681 (High Court, Johor Bahru)

Zahilah bt Mohammad Yusoff (with Nur Najihah bt Hamidi) (Federal Counsel, Johor State Legal Advisor's Office) for the appellant.
Ebrina bt Zubir (Maniam Nair & Co) for the respondent.

Nordin Hassan JCA (delivering judgment of the court):

[1] The present appeal by the appellants is against the decision of the judicial commissioner of the Johor Bahru High Court on 29 September 2021 in allowing the judicial review application by the respondent. The judicial review sought for, inter alia, an order of certiorari to quash the decision of the Disciplinary Authority to dismiss the respondent from public service and the Disciplinary Appeal Board for affirming the said decision.

[2] The first appellant was the Chairman of the Disciplinary Board for the Support Group (No 1), Immigration Department of Malaysia, the second appellant is the Disciplinary Board for the Support Group (No 1) ('DB'), the third appellant was the Chairman of the Disciplinary Appeal Board, the fourth appellant is the Disciplinary Appeal Board ('DAB'), and the fifth appellant is the Government of Malaysia.

[3] Having perused the appeal records and hearing submissions of both parties, it is our unanimous decision that there are merits in the appellants' appeal. As such, we allowed the appeal and our reasons are set down below.

BACKGROUND FACTS

[4] The respondent is an Immigration Officer, Grade KP17 and at the material time, was stationed at Unit Kualiti dan Latihan, Pejabat Immigresen, Bangunan Sultan Iskandar, Johor Bahru, Johor.

[5] Based on a report received by the first appellant regarding the respondent's conduct as a public officer, in failing to report for work without

leave or approval for 17 days, which was in breach of the Public Officers (Conduct and Discipline) Regulations 1993 ('the 1993 Regulations'), a disciplinary investigation was carried out. Having considered all the information, the first appellant instituted disciplinary proceedings against the respondent under reg 37 of the 1993 Regulations. The disciplinary proceeding was communicated to the respondent by a show cause letter dated 3 November 2016.

[6] In the same letter, the charge against the respondent was framed as follows:

> Bahawa tuan, Encik Yugantiran a/l Guinda Rajoo, No. K/P: 920614–10–5045, Pegawai Imigresen Gred KP19, semasa sebagai Pegawai Imigresen Gred KP17 bertugas di Unit Kualiti dan Latihan, Pejabat imigresen Bangunan Sultan Iskandar, Jabatan Imigresen Negeri Johor telah tidak hadir bertugas tanpa cuti atau tanpa mendapat kebenaran terlebih dahulu atau tanpa sebab-sebab yang munasabah pada tarikh-tarikh seperti berikut:

TIDAK HADIR TANPA CUTI				
TAHUN	BULAN	TARIKH	BIL. HARI	JUMLAH HARI
2015	DISEMBER	6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 22, 23, 28, 29, 30 dan 31	17	17
JUMLAH KETIDAKHADIRAN				17

> Perbuatan tersebut membolehkan tuan dikenakan tindakan tatatertib selaras dengan Peraturan 24, Peraturan-Peraturan Pegawai Awam (kelakuan dan Tatatertib) 1993 dan boleh diertikan sebagai melanggar tatalaku di bawah Peraturan 4(2)(g) dan 4(2)(i), Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993 yang berbunyi seperti berikut:
>
> > 4(2) Seseorang pegawai tidak boleh —
> >
> > (g) tidak bertanggungjawab; dan
> >
> > (i) ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah
>
> Jika tuan didapati bersalah atas pertuduhan di atas tuan boleh dihukum mengikut Peraturan 38, Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993.

[7] Further, the respondent was given 21 days from the date of the letter to make representation in writing to the first appellant, stating the grounds that he wished to rely on to exculpate the respondent from the charge against him.

[8] In the meantime, the respondent reported back to work with the Johor Immigration Department at Unit Kualiti dan Latihan.

[9] By letter dated 23 November 2016, the respondent submitted his representation within 21 days from the date of the show cause letter. In the representation, the respondent admitted that he was absent from work without leave or approval and apologized for his mistake. He explained that he was absent from work to care for his parents with health problems.

[10] Thereafter, by letter dated 1 March 2018, signed by the first appellant, the respondent was informed that on 2 December 2017, after considering the charge and the representation by the respondent, the DB found the respondent failed to exculpate himself of the charge preferred against him and as such found him guilty and dismissed him from service under reg 38(g) of the 1993 Regulations with effect from 2 December 2017. The respondent was also informed that he may appeal against the said decision to the DAB within 14 days from the receipt of the letter informing him of the decision of the DB.

[11] Subsequently, the respondent sent a letter of appeal against the DB's decision to the DAB's Chairman.

[12] However, by letter dated 27 November 2018, the respondent was informed by the DAB that his appeal was rejected as there was no cogent reason to interfere with the decision of the DB and as such the DB's decision was affirmed.

[13] Consequently, the respondent applied for judicial review at the Johor Bahru, High Court, for, inter alia, an order of certiorari to quash the decision of the DB which was affirmed by the DAB, and for the respondent to be reinstated as the Immigration Officer, Grade KP19.

[14] On 29 September 2021, the judicial commissioner of the High Court allowed the judicial review application and, inter alia, quashed the decision of the DB and the DAB. Hence the present appeal before us.

AT THE HIGH COURT

[15] Counsel for the respondent raised several issues at the High Court but the judicial commissioner considered three main issues which he found pertinent to the respondent's judicial review application. The issues are as follows:

(a) the issue of breach of rules of natural justice and whether the records of the applicant's misconduct influenced the DB's decision to dismiss the respondent instead of imposing a lesser punishment;

(b) the issue of non-compliance with reg 37(2) of the Public Officers (Conduct and Discipline) (Amendment) Regulations 2002 ('the 2002 Regulations'); and

(c) the issue of whether the DB has failed to take into account relevant considerations which amount to *anisminic error*.

[16] On the issue of natural justice, the judicial commissioner ruled that, in imposing the sentence of dismissal against the respondent, the DB was influenced by the respondent's past record, which was also absent without leave and coming late to work, without allowing him the opportunity to rebut or explain the said past conduct. Therefore, the decision of the DB was fatally flawed. The case of *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 (SC), was among the cases referred to by the judicial commissioner.

[17] On the issue of non-compliance with reg 37(2) of the 2002 Regulations, the judicial commissioner highlighted the contention by the respondent that failure to state expressly, in the show cause letter, that a 'prima facie case' had been found against the respondent is fatal to the decision of the DB. The case of *Mohammad Zulkhairi bin Zolkifli v Dato' Alias bin Hj Ahmad & 4 Others* (Judicial Review No 25–91–08 of 2018) (unreported) was quoted to support the contention. There was no finding made by the judicial commissioner on this issue that is reflected in his grounds of judgment but we believe that the judicial commissioner accepted the submission of the respondent.

[18] Next, is the issue of whether the DB has failed to take into account relevant considerations. In this regard, it was contended that the DB has failed to consider the reasons for the respondent's absence from work as explained in the respondent's representation to the DB. Further, it was argued that the DB would establish the Investigation Committee to investigate the reasons therein if the representation was properly considered. The judicial commissioner ruled that it was mandatory under reg 37 for the DB to give due consideration to the representation by the respondent. Thus, the DB failed to consider that the respondent's absence was without reasonable cause.

THE ANALYSIS AND DECISION OF THIS COURT

[19] Before we decide on the issues raised by parties in this appeal, it is instructive at this juncture to recapitulate the pertinent aspect of being a government servant or public officer and the law that governed them. Public officers are entrusted, inter alia, with the duties and responsibilities to be carried out efficiently for the public interest. In this regard, a public officer's discipline is paramount. As such, there are laws governing the conduct of a

public officer particulary the 1993 Regulations also known as General Orders (Chapter D). These laws are to ensure that public officers perform their duties by the code of conduct expected of them.

[20] This issue of duties of public officers and the law that governed them has also been discussed by the Federal Court in *Kerajaan Malaysia & Ors v Tay Chai Huat* [2012] 3 MLJ 149; [2012] 3 CLJ 577, where Ghazali Yusoff FCJ said this:

> [40] The courts should not assume the role of primary decision-taker by acting to regulate procedures found in the General Orders because this is not its constitutional function. *Chapter D of the General Orders reinforces internal discipline and accountability for wrongdoings and poor performance and helps ensure that public officers will comply with their obligations. Public officers are held accountable for their actions and omissions when these represent a violation of the duties or obligations imposed on them by legislation. The rationale is that an offence committed by a public officer in the course of carrying out his duties negatively affects the public's trust in the administration, which is a public interest given special protection by both the criminal and administrative legal orders. Public officers are expected to make decisions and act solely in the public interest, without consideration of their private interests. Public employment being a public trust, the improper use of a public service position for private advantage is regarded as a serious breach of duty.* (Emphasis added.)

[21] Thus, public officers must strictly adhere to the code of conduct embodied in the laws and administrative directives. This will ensure that they carry out their public duties efficiently and uphold the public trust in the administration. Any infringement of the code of conduct must be addressed strictly by the law to avoid any negative effect on the public service. This is also stipulated clearly in reg 3A of the 1993 Regulations which states:

> 3A(1) An Officer shall comply with the provisions of these Regulations.
>
> (2) The breach of any provision of these Regulations shall render an officer liable to disciplinary action in accordance with these Regulations.

[22] Further, disciplinary proceeding against a public officer is based on the code of conduct laid down in Chapter D of the General Orders. It is trite that the court cannot interfere with the administrative findings of public bodies including the DA or DAB unless there was a fundamental flaw and cannot substitute its conclusion on facts based on the same evidence. It is the function of the DA to weigh and assess the evidence in deciding an issue and not the court.

[23] This has been lucidly explained by the Federal Court in *Kerajaan Malaysia & Ors v Tay Chai Huat* in the following manner:

> [33] *An initiation of disciplinary proceedings against an officer in the public service shall be based upon the code of conduct laid down in GO 26 of the GO (Chapter D).*

Disciplinary action is a process for dealing with job-related behaviour that does not meet the code of conduct of officers in the public service. A departmental disciplinary action is concerned not with criminal offence but with misconduct. Departmental authorities have no power to punish an employee on a criminal charge, although such authorities may penalise an employee for his misconduct on identical facts. On the facts of the instant appeal, the defendants were basically doing that, ie, the five disciplinary offences were in relation to misconduct involving corrupt practices. *It must also be remembered that the proceedings before the disciplinary authority were not criminal proceedings*.

[34] The right to punish a citizen for crime is vested in the state whereas the right to penalise an employee for misconduct is in the employer because of the existence of relationship of master and servant and also because the General Orders so provide where public employees are concerned. *Thus, an initiation of disciplinary proceedings against an officer in the public service shall be based upon the code of conduct laid down in GO 26 of the GO (Chapter D).*

...

[36] *The courts have very limited review powers over administrative determinations of public bodies and are constrained to confirm the findings in disciplinary hearings. The courts will only intervene in disciplinary cases where there was a fundamental procedural flaw.* The courts cannot exceed its role in cases of this genre as the instant appeal. *The courts cannot interfere merely because it may come to different conclusions on facts on the same basis of the same evidence. Weighing and assessing the evidence is the function of the disciplinary authority which is the body to which the legislature has entrusted the responsibility of deciding the issue, and not the courts.* Hence, the court should approach cases of this genre as the instant appeal in the following way, namely, whether there has been an error in the process or whether there was procedural irregularity in the decision making proceedings leading to the public officer's dismissal.

[24] On the issue of absence from work, reg 23 provides as follows:

In this part, 'absence', in relation to an officer, includes a failure to be present for any length of time at a time and place where the officer is required to be present for performance of his duty.

[25] An officer who is absent without leave, is liable for disciplinary action as provided under reg 24 which states:

An officer's absence from duty without leave or without prior permission or without reasonable cause shall render him liable to disciplinary action.

[26] Having highlighted the relevant principles of law, now we move to the issues in contention.

The issue of breach of rules of natural justice and whether the records of the applicant's misconduct influenced the DB's decision to dismiss the respondent instead of imposing a lesser punishment

[27] Essentially, the complaint was that the DB has considered the respondent's previous misconduct of being absent from work and coming late to work without allowing the respondent to explain, contradict or rebut them. Thus, it was argued that the DB's conduct breached the rules of natural justice.

[28] On this issue, to begin with, it is to be noted that in the respondent's representation to the DB dated 23 November 2016, the respondent unequivocally admitted to the charge proffered against him which was absent from work for 17 days without leave or approval. The respondent also admitted that his conduct breached the 1993 Regulations and apologized for his misconduct and promised that it would not happen again. Here, it is useful to reproduce the content of the said representation which is as follows:

> SURAT REPRESENTASI ATAS TIDAK HADIR TUGAS TANPA CUTI/KEBENARAN PADA TAHUN 2015
>
> Dengan segala hormatnya, saya YUGANTHIRAN A/L GUINDA RAJOO, No. KP: 920614-10-5045 selaku PEGAWAI IMIGRESEN KP19 yang bertugas di Unit Kualiti dan Latihan, Bangunan Sultan Iskandar ingin membela diri atas kesilapan yang dilakukan iaitu tidak hadir bertugas sebanyak 17 hari iaitu bulan Disember 2015.
>
> 2. Saya ingin representasi di atas beberapa sebab yang agak kritikal. Keadaan *kesihatan ayah saya merupakan sebab yang afdal untuk mendorong saya tampil membuat kesilapan ini tanpa saya sedar*. Situasi ayah saya yang kronik masih mentah lagi dalam sanubari saya walaupun sehingga sekarang. Penyakit kencing manis yang merupakan perosak kesejahteraan keluarga sudah melanda dan telah memusnahkan setiap kebahagiaan keluarga saya. Pada masa tersebut, ayah saya tidak boleh berjalan malah kerusi roda telah menjadi kenderaan beliau.
>
> 3. Situasi yang kritikal ini telah memaksa saya untuk mengambil keputusan untuk berada di sisi ayah saya serta merta *tanpa memikirkan kesan buruk akibat perbuatan saya ini*. Sejak dua tahun lepas sehingga kini merupakan tempoh masa yang telah membawa kepiluan dan kesedihan yang tidak terhingga dalam keluarga saya. Selain itu, ayah saya harus menerima rawatan rapi setiap hari di hospital dan masalah ini merupakan salah satu faktor untuk melakukan kesalahan tersebut kerana ahli keluarga saya tidak tahu memandu. Untuk makluman pihak tuan/puan, ibu saya juga mengalami masalah spinal sejak empat tahun lalu. Beliau tidak larat membuat kerja berat seperti memindahkan ayah saya dari kerusi roda ke katil dan lain-lain lagi. Tuan, berikut merupakan sebab utama saya kerap balik ke rumah saya di Klang untuk menjaga ayah saya yang tidak berupaya dan membantu ibu saya yang tidak bermaya. Pada masa tersebut, saya tidak dapat menumpukan perhatian yang sepenuhnya dalam bidang kerjaya saya akibat tekanan dari pihak keluarga dan tempat bertugas.
>
> 4. Lantaran itu, saya merupakan anak sulung dan adik-beradik saya masih belajar di IPTA dan sekolah. Sebagai anak sulung, saya memikul segala tanggungjawab dan beban serta membantu mereka dari semua aspek seperti kewangan dan lain-lain lagi. Saya memohon maaf di atas perbuatan saya ini dan saya menyesal atas tingkah laku saya. Di samping itu, untuk pengetahuan tuan, saya juga telah merancang

untuk memindahkan semua ahli keluarga saya dari Klang ke Johor Bahru pada tahun depan supaya saya dapat berada disisi mereka dan menjaga mereka.

5. Dengan ini, saya telah menyertakan gambar dan laporan perubatan ibu bapa saya pada saat tersebut di bahagian lampiran. Di sini, *saya ingin mengaku bahawa perbuatan saya bukanlah sesuatu yang betul malah salah mengikut PERATURAN 37, PERATURAN-PERATURAN PEGAWAI AWAM (KELAKUAN DAN TATATERTIB) 1993. Saya memohon maaf sekali lagi atas kesilapan dan kecuaian saya melalui surat representasi ini.*

6. Oleh yang sedemikian, saya mengucapkan jutaan terima kasih di atas kesabaran tuan/puan membaca surat representasi. Saya juga berharap tuan/puan akan mempertimbangkan rayuan representasi saya dan memberi keputusan yang positif dan lagi satu peluang kerana saya masih ingin berkhidmat dengan JABATAN IMIGRESEN MALAYSIA. *MAAFKAN saya dan saya berjanji tidak akan mengulangi kesilapan yang sama pada masa akan datang*. Saya bersedia berkhidmat untuk Jabatan demi kesejahteraan rakyat dan negara. (Emphasis added.)

[29] The respondent's representation was considered by the DB and it was found that the respondent has failed to exculpate himself from the charge proffered against him. Consequently, the respondent was found guilty of the charge and was dismissed from service. In the affidavit in reply by the DB's Chairman, this was stated:

7.10 Setelah meneliti fakta, dokumen termasuklah representasi Pemohon, Lembaga yang dipengerusikan oleh saya dalam mesyuarat pada 2.12.2017 mendapati bahawa *representasi Pemohon secara keseluruhannya gagal membebaskan diri* Pemohon dari pertuduhan yang dikenakan ke atasnya.

7.11 Lanjutan mesyuarat tersebut, *Lembaga Tatatertib* yang dipengerusikan oleh saya telah *memutuskan bahawa Pemohon bersalah ke atas pertuduhan tersebut*.

7.12 Atas dapatan bersalah tersebut, *Lembaga Tatatertib* dipengerusikan oleh saya, *menjatuhkan Hukuman Buang Kerja terhadap Pemohon* mengikut Peraturan 38(g) Peraturan-Peraturan Pegawai Awam (Kelakuan & Tatatertib) 1993. Hukuman tatatertib berkuatkuasa pada 2.12.2017. (Emphasis added.)

[30] The law is also trite in that the decision to decide whether a public officer has exculpated himself or otherwise is on the DA, not the court. The phrase 'to the satisfaction of the appropriate Disciplinary Authority' under General Order 37(4) is unambiguous which confers the said power to the DA. The provision states:

(4) If an officer does not make any representation within the period specified in paragraph (2)(b), or if the officer makes such a representation but the representation *does not exculpate himself to the satisfaction of the appropriate Disciplinary Authority*, the Disciplinary Authority shall then proceed to consider and decide on the dismissal or reduction in rank of the officer. (Emphasis added.)

[31] The Federal Court in *Public Services Commission Malaysia & Anor v*

Vickneswary a/p RM Santhivelu (substituting M Senthivelu a/l R Marimuthu, deceased) [2008] 6 MLJ 1; [2008] 6 CLJ 573 in discussing the provisions of the General Orders which are almost the same with the present provisions of the General Orders, explained this principle of law as follows:

> [43] I had mentioned in para 22 above, according to GOs 24, 25, and 26, *the decision whether to refer a case to a committee of inquiry is the discretion of the disciplinary authority. In so deciding whether to refer to the committee of inquiry, the disciplinary authority would have to consider the written representation of the respondent ie, whether his written representation exculpated himself from the charges preferred against him.*
>
> [44] *From these GOs, it can be clearly concluded that it is the disciplinary authority and not the court who is to decide whether the officer in his written representation has exculpated himself*. The answer to question (iii) must therefore be answered in the negative i.e., that it is not the court but disciplinary authority who is to decide this question of whether he has exculpated himself by his written representation. (Emphasis added.)

[32] Here, based on the facts and law, we are of the view that the DA has not breached any procedural or substantive laws governing the disciplinary proceedings against the respondent when deciding that the respondent has failed to exculpate himself of the charge proffered against him.

[33] Now we move to the respondent's bone of contention of breach of natural justice for not allowing the respondent to challenge, explain or rebut his past conduct.

[34] To begin with, natural justice has been explained in a plethora of cases, and the Supreme Court in *Shamsiah bte Ahmad Sham v Public Services Commission, Malaysia & Anor* addressed this principle of natural justice in the following words:

> ... *Natural justice* is a concept which involves common law rules, namely, (a) *the right to be heard* (a*udi alteram partem*): *the principle that a decision-maker must afford an opportunity to be heard* to a person whose interests will be adversely affected by the decision, and (b) *the rule against bias* (*nemo debet esse judex in propria sua causa*): the principle that *a decision-maker must be disinterested or unbiased* in the matter to be decided. The classical statement of the fair hearing rule of course comes from the judgment of Lord Loreburn in *Board of Education v Rice* [1911] AC 179 at p 182:
>
> > ... they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view. (Emphasis added.)

[35] In the present case, the respondent was given the right to be heard when he was asked to present his written representation to the DB to state his case which he did by letter dated 23 November 2016. The principle of law is trite in that the right to be heard does not necessarily mean the right to be heard orally. This right to hear oral evidence only arises when the DB exercises its discretionary power to appoint an Investigation Committee under General Order 37(5), General Orders (Chapter D). Again, the discretionary power to appoint the Investigation Committee is with the DA when further clarification is needed and not the court. For ease of reference, General Order 37(5) provides as follows:

> (5) If the appropriates Disciplinary Authority of the opinion that the case against the officer requires further clarification, the Disciplinary Authority may establish an Investigation Committee for the purpose of obtaining such further clarification.

[36] In *Vickneswary*'s case, the issue of the right to be heard has been lucidly explained as follows:

> [23] *General Order 26(7)* imposes a duty upon the committee to give the officer an opportunity to be present and to question any witnesses examined by the committee, but then only if the witnesses are called by the committee. That GO reads:
>
> *If witnesses are examined by the Committee, the officer shall be given an opportunity to be present and to question the witnesses on his own behalf* and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.
>
> [24] From this, *it is clear that it is never the intention of the legislators to give an officer under disciplinary action the right to give oral evidence.* In any case, as far as the deceased was he was given an opportunity and he did give a very lengthy letter explaining in detail why he could not have committed the acts of which he was charged under. He said in his letter that he was prepared to appear before the disciplinary authority to answer questions that the disciplinary authority may wish to pose to him. Obviously, the disciplinary authority decided from the evidence available to it that it was not necessary to hear the deceased in person.
>
> [25] *From the provisions of the general orders, it is clear that it is never the intention of the legislators that the courts should step into the shoes of the disciplinary authority in deciding whether it was fair to the respondent to have granted him a right to make oral representations or whether he should be given such right although he did not ask for it.* (Emphasis added.)

[37] On the same issue, the Federal Court in *Tay Chai Huat*'s case re-emphasized the principle of law in the following manner:

> [30] The use of authorities, or decided cases, is the establishment of some principle which a judge can follow in deciding the case before him. In the instant appeal, several authorities relating to the GO (Chapter D) were referred to as to what was intended and what it expressly provides. *My question is what right have the courts to*

cut down the express power so given to the disciplinary authority by the General Orders? Utra Badi and Vickneswary are cases which established the principles of law vis-a-vis the General Orders. Are we entitled to disregard a previous decision of this court laying down a substantive rule of law? There is no doubt, *in my view, that the ratio decidendi of the decision of this court in Utra Badi is that the right to be heard given by art 135(2) of the Federal Constitution does not require that the person concerned be given an oral hearing and that a decision by a disciplinary authority not to give the person concerned an oral hearing after he has submitted a written representation is not a denial of justice.* There is also no doubt, in my view, that the ratio decidendi of the decision of this court in *Vickneswary* would be as follows:

(a) *under the provisions of the General Orders, the courts should not step into the shoes of the disciplinary authority in deciding whether it was fair to the person concerned, after he has made a written representation, to have granted him a right to make oral representation or whether he should be given such right although he did not ask for it; and*

(b) *it is not the court but the disciplinary authority which has to decide the question of whether the person concerned has exculpated himself by his written representation.*

[31] From my reading of the judgments in *Utra Badi* and *Vickneswary* which reflected the reasons for the respective decisions, they leave no doubt as to the ratio of the respective decisions of this court. We must not accept the conclusions in these cases as mere dictum but as the ratio decidendi of the cases. *Utra Badi* and *Vickneswary* were former deliberate and explicit decisions of this court upon questions of law. (Emphasis added.)

See also *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l Perumal* [2001] 2 MLJ 417; [2001] 2 CLJ 525.

[38] In the present case, undoubtedly, there was no breach of natural justice when the right to be heard is concerned. The respondent has been given the right to be heard as mentioned earlier. Next, the issue of biasness of the DB was not raised as a ground to challenge the DB's decision and we do not find any bias by the DB.

[39] Reverting to the respondent's contention that he was not given the opportunity to challenge, explain or rebut the past records, our considered view is as follows. Firstly, the charge against the respondent, as alluded to earlier, is specific in that the respondent was absent from work for 17 days. This was admitted by the respondent in his representation to the DB. The DB needs no further clarification when the misconduct was admitted by the respondent. Hence, the appointment of an Investigation Committee to hear oral evidence does not arise.

[40] What is more pertinent here is that the misconduct, as per the charge against the respondent, is serious for a dismissal sentence with or without past records. After all, the past records were the same concerning absence from work besides coming late to work.

[41] The Supreme Court case of *Shamsiah bte Ahmad Sham* can readily be distinguished on its fact. In that case, the past records were inserted in the charge itself. Thus, it is pertinent for Shamsiah to challenge, explain or rebut the said records. Further, the past records in *Shamsiah*'s case were more serious than the one she was charged with. The past records were four disciplinary actions were taken against her for being late to report for duty and three times for taking longer time to complete her work assignments. For easy reference, the charge proffered against Shamsiah was as follows:

> That you Shamsiah bte Ahmad Shah, employed as a book-binder in the Government Printing Department, Kuala Lumpur have been found to be *negligent and not diligent in your duty by not completing all the duty dockets given to you in the specific time* as stated in the Appendix 'A'. Your lack of diligence has resulted in financial loss to the Government. Your irresponsible behaviour is against rule 3(h), of the Rules of Public Officers (Disciplinary and Conduct) (General Order Chapter 'D') 1969, whereby disciplinary action with a view to your dismissal can be taken pursuant rule 30.'
>
> 2 *Apart from that, it has been observed that several disciplinary actions have been taken against you by the Board of Discipline of your department on account of similar defaults as well as other faults. However, they had no effect on you.*
>
> 3 In accordance to the requirement of rule 30(2) of the Rules of Public Officers (Conduct and Discipline) (General Orders Chapter 'D'), you are requested to submit:
>
> (a) your defence to this charge; and
>
> (b) show cause why you should not be dismissed from service.
>
> Your reasons and submissions must be submitted to the Secretary, Public Services Commission within fourteen (14) days from the date that you received this letter. If you do not reply within this specific duration of time, you are assumed to have no defence and this matter will be decided on the basis of the present evidence against you. (Emphasis added.)

[42] It is also to be noted that the charge against Shamsiah was not serious as in the present case, the charge against her was for being negligent and not diligent in her duty. This misconduct on its own, would not be proportionate to a dismissal sentence. This was also acknowledged by the Supreme Court in that case, where Jemuri Serjan SCJ said this:

> *In our view, para (2) of the show cause letter by itself constituted an intrinsic evidence that the first respondent, though acting perfectly in good faith, had taken these damaging materials into account in deciding to dismiss her, using her previous disciplinary actions and punishments as aggravated circumstances. Armed with the record of all the various*

disciplinary actions and punishments against her it would seem inevitable and indeed logical under the circumstances for the first respondent to have decisively reached at the determination to dismiss her. It was as if her casual attitude towards her previous disciplinary punishments demonstrated her as an obstinate, incorrigible, and delinquent civil servant and under these circumstances, therefore, we could not see what other decisions the first respondent could otherwise possibly make. The adverse record had sealed her fate as a civil servant. *It seemed to us that the grounds for the disciplinary action before the first respondent by themselves were not serious enough to merit a dismissal without taking into account those damaging materials concerning the conduct of the appellant.* (Emphasis added.)

[43] Unlike in the present case, the charge against the respondent as mentioned earlier is serious and can be sentenced to dismissal, the past records were not in the charge itself and there was no cogent evidence to show that the DB had considered the respondent's past records to impose the dismissal sentence against him. In addition, the charge against the respondent is almost the same as the respondent's previous misconduct. Further, in *Shamsiah*'s case and other cases referred to by the respondent to support its contention, the charges against them were disputed and challenged by the officers, unlike the present case.

[44] Next, the DA is the best judge to decide whether a public officer in disciplinary proceedings should be dismissed or be imposed with a lesser sentence and this discretionary exercise should not be interfered with by the court. This too has been explained in *Tay Chai Huat*'s case as follows:

> [29] We are a country governed by the rule of law and thus finality of the judgment is absolutely imperative and great sanctity is attached to the finality of the judgment. In the normal course, *it is the disciplinary authority which is the best judge as to whether the person should be dismissed.* In that context, *the court can only exercise its powers of interference in a limited number of cases where it is shown that the decision to suspend is arbitrary and/or a mala fide exercise of power and/or colourable exercise of power.* These are the parameters on which a disciplinary authority must consider when exercising its powers under the GO (Chapter D). *It is not for the courts to interfere with exercise of discretion by the disciplinary authority otherwise than in the circumstances set out.* (Emphasis added.)

[45] In the present case, there is nothing to show that the DA has acted arbitrarily or with mala fide in deciding the case against the respondent. As such, there is no reason for the court to interfere with the exercise of an administrative function by the DA in this case in dismissing the respondent from service.

[46] In the circumstances, we find that the judicial commissioner fell into error in accepting the respondent's contention that there was a breach of

natural justice when the DB considered the past records of the respondent. We agree with the appellant's submission that contended otherwise.

The issue of non-compliance with reg 37(2) of the Public Officers (Conduct and Discipline) (Amendment) Regulations 2002 ('the 2002 Regulations')

[47] On this issue, the appellants contended that the failure to state expressly, in the show cause letter, that the Chairman of the DB has found a prima facie case against the respondent is not fatal to the decision of the DB. Conversely, the respondent argued otherwise, and that the failure has infringed reg 37(2) of the 2002 Regulations.

[48] Regulations 37(1) and (2) reads:

> 37(1) If it is determined under sub-regulation 35(2) that the disciplinary offence complained of against an officer is of a nature that warrants a punishment of dismissal or reduction in rank, the Chairman of the appropriate Disciplinary Authority to which the case is referred shall consider all the available information.
>
> (2) *If it appears to the Chairman of the appropriate Disciplinary Authority that there exists a prima-facie case against the officer*, the Chairman of the appropriate Disciplinary Authority shall —
>
> (a) direct that a charge containing the facts of the disciplinary offence alleged to have been committed by the officer and the grounds on which it is proposed to dismiss the officer or reduce his rank be sent to the officer. (Emphasis added.)

[49] The provision of reg 37(2) above is plain and unambiguous that the Chairman of the DB shall direct that a charge and the grounds the DB propose to dismiss or reduce his rank be sent to the officer if it appears to the Chairman of the DB that there exists a prima facie case.

[50] There is nothing under reg 37(2) or any other regulation of the 2002 Regulations, that requires the Chairman of the DB to expressly state in the show cause letter that the Chairman has found a prima facie case exists. Here, as there is no requirement under the law, the issue of its infringement does not arise.

[51] In the present case, the Chairman of the DB has made his finding that there is a prima facie case against the respondent. Consequently, the charge and the grounds the DB proposed to dismiss or reduce the respondent's rank mentioned in the show cause letter were sent to the respondent. This is clearly stated in his affidavit in reply as follows:

> 7.6 Selanjutnya, setelah menimbang segala maklumat yang ada, *saya sebagai Pengerusi Lembaga Tatatertib Kumpulan Sokongan (No 1) mendapati bahawa wujud*

suatu kes prima facie terhadap Pemohon yang mewajarkan Pemohon dikenakan tindakan tatatertib dengan tujuan Buang Kerja atau Turun Pangkat di bawah peraturan-Peraturan Pegawai Awam (Kelakuan & Tatatertib) 1993.

7.7 Surat Tindakan Tatatertib dengan Tujuan Buang Kerja atau Turun Pangkat bertarikh 3.11.2016 telah dikeluarkan ke atas Pemohon selaras dengan Peraturan 37, Peraturan-Peraturan Pegawai Awam (Kelakuan & Tatatertib) 1993 bagi Pertuduhan yang dikenakan, di mana surat tersebut mengandungi fakta kesalahan tatatertib berserta alasan pertuduhan. (Emphasis added.)

[52] In the circumstances, we find, that the requirement of reg 37(2) of the 2002 Regulations has been complied with.

[53] In addition, we need to emphasize here that disciplinary proceedings is not criminal case and technicalities in criminal proceedings should not be applied to disciplinary proceedings. Disciplinary action only concerns the misconduct of a public officer and not a criminal offence. This matter has been discussed and explained by the Federal Court in *Tay Chai Huat*'s case in the following manner:

[32] In the instant appeal, I am of the view that the trial judge and the Court of Appeal did not properly appreciate the facts and the applicable law to arrive at a judicious decision. *From my reading of the judgments of the trial judge and the Court of Appeal, the approach taken, with respect, was as if the matter was a criminal case wherein the provisions of the Criminal Procedure Code and the Evidence Act 1950 would seem to apply. This approach is erroneous. It must be stressed that the courts cannot introduce technicalities of a court of law to the disciplinary authority.* Further, courts do not normally regard it as their function to interfere with the findings of fact by the disciplinary authority. In *R v Deputy Industrial Injuries Commissioner, ex p Moore* [1965] 1 QB 456, Diplock LJ said (at p 488):

> *These technical rules of evidence, however, form no part of the rules of natural justice*. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based upon material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may take into account any material which, as a matter of reason, has some probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue. The supervisory jurisdiction of the High Court does not entitle it to usurp this responsibility and to substitute its own view for his. (Emphasis added.)

[33] An initiation of disciplinary proceedings against an officer in the public service shall be based upon the code of conduct laid down in GO 26 of the GO (Chapter D). *Disciplinary action is clearly a process for dealing with job-related behaviour that does not meet the code of conduct of officers in the public service. A departmental disciplinary action is concerned not with criminal offence but with misconduct*.

Departmental authorities have no power to punish an employee on a criminal charge, although such authorities may penalise an employee for his misconduct on identical facts. On the facts of the instant appeal, the defendants were basically doing that, ie, the five disciplinary offences were in relation to misconduct involving corrupt practices. It must also be remembered that the proceedings before the disciplinary authority were not criminal proceedings.

[54] Even in criminal proceedings, failure to record a finding does not occasion a miscarriage of justice. This can be seen in the Federal Court case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 where this was said:

> [11] In our respectful view, Arulpragasan is authority for the proposition that the test to be applied under the former ss. 173(f) and 180 of the CPC is that the prosecution must establish its case beyond a reasonable doubt before an accused could be called upon to enter his defence. It is not authority for the proposition that it is incumbent for a court to make a finding at the close of the prosecution's case that he was satisfied that the prosecution had proved its case beyond reasonable doubt. *The failure by the trial court either to make or to record such a finding does not in our judgment occasion a miscarriage of justice ...* (Emphasis added.)

[55] The present case, which is not a criminal proceeding, and the requirement of reg 37(2) has been complied with as discussed earlier, we agree with the appellants that the non-stating expressly in the show cause letter that the Chairman of the DB has found a prima facie case against the respondent is not fatal to the DB proceedings against the respondent.

The issue of whether the DB has failed to take into account relevant considerations which amount to anisminic error

[56] The judicial commissioner of the High Court was of the view that the DB has failed to consider the reasons given by the respondent for his absence from work which were the poor health of his parents and that the respondent had to take care of them and his family. It was the finding of the judicial commissioner that the records do not show those factors have been considered by the DB. Further, if the factors were considered fully by the DB, the DB would have decided to appoint an Investigation Committee under reg 37(5) of the 2002 Regulations or consider a lesser punishment against the respondent.

[57] On this issue, having perused the records, we cannot agree with the judicial commissioner that the DB has failed to consider the reasons for the respondent's absence from work. The reasons were specifically mentioned in the respondent's representation dated 23 November 2016 which was sent to the DB. The DB then considered all relevant information including the said representation before deciding to dismiss the respondent as the representation has failed to exculpate the respondent. This is reflected in the affidavit in reply

by the Chairman of the DB which states as follows:

> 7.9 Pemohon telah menerima surat tersebut pada 23.11.2016 dan telah membuat representasi bertulis kepada Pengarah Bahagian Integriti Jabatan Imigresen Malaysia pada 23.11.2016.
>
> (Sesalinan Representasi bertulis Pemohon bertarikh 23.11.2016 disertakan sebagai Exhibit 'MA-2')
>
> 7.10 *Setelah meneliti fakta, dokumen termasuklah representasi Pemohon, Lembaga yang dipengerusikan dalam mesyuarat pada 2.12.2017 mendapati bahawa representasi Pemohon secara keseluruhannya gagal membebaskan diri Pemohon daripada pertuduhan yang dikenakan ke atasnya.* (Emphasis added.)

[58] As mentioned earlier in this judgment, it is the discretion of the DA whether to appoint a Committee of Inquiry if further clarification is needed which is not in the present case. In addition, the discretion to impose a suitable sentence is placed with the DA and the said exercise has been taken by the DA in this case.

[59] In the circumstances, we find that there is merit in the appellants' contention on this issue.

[60] We have also considered other issues raised by the respondent which were not canvassed by the judicial commissioner of the High Court and found that the issues raised were bereft of any merit.

The law on judicial review

[61] It is a settled principle of law that the decision in relation to public duty and function which includes the decision of the DA may be reviewed on grounds of illegality, irrationality, procedural impropriety, or proportionality.

[62] The Federal Court in *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 quoted the elaboration by Lord Diplock in *Council of Civil Service Unions and others v Minister for the Civil Service* [1984] 3 All ER 935 about the definition of illegality, irrationality and procedural impropriety which is as follows:

> In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:
>
> > *By 'illegality'* as a ground for Judicial Review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

> *By 'irrationality',* I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.
>
> I have described the third head as *'procedural impropriety'* rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that the expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.
>
> Lord Diplock also mentioned *'proportionality'* as a possible fourth ground of review which called for development. (Emphasis added.)

[63] Illegality includes an error of law and is subject to judicial review as explained by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1, where it states:

> in our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, etc' kind, *judicial review will lie to impeach all errors of law made by an administrative body or tribunal and,* we would add, inferior courts. In the words of Lord Denning in *Pearlman v Harrow School* (ibid) at p 70, '… no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it. (Emphasis added.)

[64] The meaning of error of law has also been explained in the case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748, in the following words:

> *It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law,* for the categories of such an error are not closed. But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or *if he misconstrues the terms of any relevant statute, or misapplies or misstates a*

principle of the general law. (Emphasis added.)

[65] The court may review not only the decision-making process but also its substance. This also has been explained in the case of *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629, in the following words:

> Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that *the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibility 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.* (Emphasis added.)

[66] Reverting to the present case, the DA and also the DAB acted within the legal power provided to them, and all the relevant procedures under the regulations were strictly adhered to by them. We do not find any illegality, irrationality, or procedural impropriety in the disciplinary proceedings against the respondent and the sentence of dismissal was within their power under reg 38(g) of the 1993 Regulations. The sentence is also proportionate with the serious misconduct by the respondent.

CONCLUSION

[67] Based on the aforesaid reasons, it is our unanimous decision that there are merits in the appellants' appeal which warrant the intervention of this court. As such, the appellant's appeal is allowed and the decision of the High Court is set aside. The decision of the DA and affirmed by the DAB is restored. In the circumstances of this case, we make no order as to costs.

Appeal allowed, High Court's decision set aside and decisions of the DB and DAB restored.

Reported by Ashok Kumar